HB

100

MEMORANDUM State of Alaska

TO: Bill Ross
Commissioner

DATE: Febuary 19, 1985

FILE NO:

TELEPHONE NO: 465-2640

FROM: Keith Kelton
Director
Division of Environmental Quality

SUBJECT: Spill Expense Reserve Account History and Status Report

In 1976, the Alaska Legislature passed its first major legislation addressing the problem of oil spills. It required oil spill contingency plans, proof of financial responsibility for cleanup efforts, as well as provisions for charges against terminal users and oil tankers based on the degree of spill risk their equipment and operations presented. Funds collected from the program were to be used to develop a contingency fund to meet cleanup costs in the event of a major spill. The fund was struck down by the courts, leaving the other two provisions intact.

In order to maintain the State's oil pollution control program, a new bill, HB 205, was introduced by the 1979 Legislature. This legislation extended the contingency plans and financial responsibility to offshore exploration and production facilities, and oil barges. The new legislation was to correct the defects in the 1976 law and ensure that Alaska had a strong program for preventing and mitigating the effects of an oil spill. Chapter 120, SLA 80, Section 53 provided $1,542,600 for HB 205 (FY 80), and provided a $1 million expense reserve and a fiscal note to start and fund the Oil Pollution Control Program. The Spill Expense Reserve was to pay costs directly involved in the abatement, containment, and removal of a discharge of oil or hazardous substances: the fiscal note provided for staff, equipment, and training.

House Journal Supplement No. 43 indicated that, "the cleanup reserve be maintained by capital appropriation at the $1 million level. The balance of the reserve should carry over from year to year. Subsequent budget requests may be less than $1 million." An additional $250,000 was appropriated in 1981 and another $250,000 in 1984.

Since the inception of the program, hundreds of spills have been cleaned up. Most of the expenses are charged directly to the spiller. When the spiller was unknown or the spill incident required immediate emergency action, the spill reserve was used to fund the cleanup work.

Some spills involve action by the courts and the Attorney General's Office. The account balance on January 31, 1985, was $410,080.74. There are several spills that are still in the litigation or pre-litigation stages and may require sizable funding. The Nome Gasoline Spill has cost over $680,000 to date.

On December 27, 1984, we received a reimbursement of $597,896.07 for spill expenses from the U.S. Coast Guard for the Nome Spill; this is the first time that the state has received federal funds for reimbursement of spill expenses.

On July 14, 1983, a settlement/agreement was reached between the State and the Alyeska Pipeline Service Company on the two spills that occurred over four years prior, the Atigun Pass Spill and the Mile Post 734 Spill. The settlement was for $350,000.

AS 46.03.758(k) states that "penalties received by the state under this section shall be deposited in the general fund and credited to a special account called the 'oil spill mitigation account.' The legislature may annually appropriate from the spill mitigation account a sum equivalent to the amount of penalties received under this section for the calendar year preceding the legislative session in which the appropriation is made, the appropriation to be made for the purpose of restoring and enhancing environments affected by oil pollution, including but not limited to the funding of aquaculture projects."

Amount expended in FY 84		$ 785,112.62
Amount expended for FY 85 to date		69,827.18
	TOTAL	$ 854,939.80
Amount recovered FY 84		354,541.73
Amount recovered FY 85 to date		608,885.58
	TOTAL	$ 963,427.31

We are asking for a capital appropriation of $550.0 for FY 86 to bring the Spill Reserve Account back up the $1.0 million level.

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PROJECT TITLE: Spill Expense Reserve Account

AGENCY PRIORITY: __ __ OF __ __

LOCATION: Statewide

ELECTION DISTRICT: 99

FISCAL YEAR: 8 6 DURATION: continuing

APPROPRIATION TO: Alaska Department of Environmental Conservation

PROGRAM: Oil Pollution Control

	FUNDING:	CAPITAL REQUEST	REVISED REQUEST	OPERATING COSTS
1002	FEDERAL RECEIPTS			
1003	GENERAL FUND MATCH			
1004	GENERAL FUND	550.0		
1005	INTER-AGENCY RECEIPTS			
1028	PROGRAM RECEIPTS			
	TOTALS:	550.0		
	POSITIONS (PFT):			-0-

PROJECT DESCRIPTION AND JUSTIFICATION:

LINE (1) To fund cleanup of oil or hazardous substance on land and inland waters of the state, account originated

LINE (2) in FY 80 by HB250 with $1 million and appropriations in FY 81 and 84 of $250.0 each. HJ Supplement 40

LINE (3) states account to be maintained at $1 million, funds to be continuing from year to year. AS 46.03.758(k)

LINE (4) states appropriations may be made annually, revenue from fines and forfeitures deposited to General Fund.

CP1 CAPITAL PROJECTS DESCRIPTION

DATA ENTRY WORKSHEET

(6/84)-cp1

WORKSHEET

REVISED DATE

FY 86

Since the inception of the program, hundreds of spills have been cleaned up. Most of the expenses are charged to the spiller. If the spiller is unknown or the spill incident requires immediate emergency action, the spill reserve account is used to fund the cleanup work.

Some spills involve action by the courts and the Attorney General's Office. The account balance at this time is $447.0. There are several spills that have not been cleaned up completely and may require sizable funding. The Nome Gasoline Spill has cost over $680.0 to date and the North Slope Salvage Spill has cost over $38.0, both are under litigation.

From July 1980 to the end of August 1984, the amount received from spillers has been more than $470.0. Reimbursement from federal funds for the major part of the Nome Spill is expected upon completion of an audit by the U.S. Coast Guard.

We are asking for a capital appropriation of $550.0 for FY 86 to bring the Spill Reserve Account back up to the $1 million level.

CP1 ADDITIONAL EXPLANATION FORM

(6/84)-ael

AGENCY Environmental Conservation

PROGRAM NRMEC

BRU Environmental Conservation

COMPONENT Oil Pollution Control

REVISED DATE

FY 86

EXPLAIN THE REMAINING FIVE YEARS OF THE SIX-YEAR CAPITAL IMPROVEMENT PLAN (FY 87, 88, 89, 90, 91). DESCRIBE THE NEEDS TO BE MET IN THE COMING YEARS AND THE PROJECTS OR TYPES OF PROJECTS WHICH MAY BE REQUESTED TO MEET THOSE NEEDS. PLEASE INCLUDE MAJOR MAINTENANCE OR REPLACEMENT PROJECTS. ESTIMATE THE APPROXIMATE COST OF THE PROJECTS. IF THE PROJECTS ARE TO OCCUR SO FAR IN THE FUTURE OR ARE OF SUCH AN INDETERMINATE NATURE THAT A COST ESTIMATE WOULD NOT BE RELIABLE, PLEASE INDICATE THIS FACT. NOTE WHETHER A SIGNIFICANT PORTION OF THE TOTAL FUNDING WILL COME FROM NON-GENERAL FUND SOURCES. MAKE SPECIFIC REFERENCE TO FORMAL PLANNING DOCUMENTS USED AS A BASE FOR THIS DISCUSSION (FOR EXAMPLE, THE LONG-RANGE STATE TRANSPORTATION PLAN). PLEASE ATTACH A COPY OF PUBLISHED MATERIALS.

During the next five years, we would like to have yearly appropriations from the general fund that would keep the account at the $1 million level. All of the projects are of an indeterminate nature since we cannot predict when a spill will occur or its severity, location, chemical composition, or the environmental implications involved.

Chapter 116 SLA 1980 states "the two main purposes of this law are to provide protection to Alaskans from damage from oil spills and to provide the ability to clean up a spill and restore damaged areas."

The increase in oil and chemical development, increase in traffic and shipment of product, increased population and land development all lead to a broader spill experience potential. Our projection for following years will be based on records, experience and continuing projects.

AS 46.04.010 states the Department shall promptly seek reimbursement, either under 46.03.760(e) or from an applicable federal fund, for the expenses it incurs in cleaning up or containing a discharge of oil. Monies received under this section shall be deposited in the general fund.

In most cases the amount of requested appropriation will be offset by revenue received from fines and forfeitures.

CP2 CAPITAL PROJECTS PLAN FY 87-FY 90 EXPLANATION

(6/84)-cp2

AGENCY Environmental Conservation

PROGRAM Oil Pollution Control

PAGE OF

REVISED DATE

FY 86

CH, SLA, PAGE, LINE, OR RP	PROJECT TITLE AND LOCATION	AMOUNT AUTHORIZED	ESTIMATED TOTAL EXPENDITURE THROUGH JUNE 1984	PLANNED EXPENDITURE THROUGH COMPLETION	EST. COMP. DATE	STATUS
CH 82/81 P 141 L7	Spill Reserve Account Statewide	250.0	25.5	224.5		These are continuing funds

CP3 STATUS OF CURRENTLY AUTHORIZED CAPITAL PROJECTS

(6/84)-cp3

AGENCY Environmental Conservation

PAGE OF

REVISED DATE

FY 86

4. State Hazardous Waste Disposal Day Campaign

- This is the third year that ADEC has conducted this service to assure proper disposal of unregulated hazardous wastes from households and small businesses. This year ADEC requested the 4 municipalities contribute a percentage toward the cleanup. Testing and disposal costs are increasing so rapidly that the state will need to request a significant amount from municipalities next year or reduce services.

II. Site Investigations of Potentially Hazardous Waste Disposal

- In Alaska there are currently 97 potential uncontrolled hazardous waste sites identified on an EPA list. 45 of those sites are being investigated by the Department of Defense, 7 sites are being investigated by EPA, and during the past year ADEC performed preliminary investigations at 45 sites.

- ADEC ranked the 50 sites as to the significance of potential hazards and will be further evaluating 15 of the high ranking sites this summer. These site investigations may disclose potential or actual environmental contamination causing the site(s) to be listed as a federal Superfund site.

- To cope with any necessary remedial action, Alaska will need to establish a state site cleanup fund and hire additional staff to manage any corrective actions required at each site.

III. Drilling Muds and Fluids

- Drilling muds and fluids are excluded from regulation as a hazardous waste under both the federal and state hazardous waste statutes.

- Drilling muds are managed in Alaska under existing solid waste regulations for land disposal. Muds and fluids generated off-shore are regulated either under a state waste water discharge permit or a federal NPDES permits. In many cases muds are stored for re-use and the fluids reinjected into the formation.

- The existing statutes are strong enough to allow development of the states resources and minimize risks to the public and the environment. ADEC is developing internal guidelines for permit review and stipulations to assure consistency as well as protection of the environment considering the diverse geological and climatalogical conditions found in the state.

IV. Waste Oil

1. Oil Spill Expense Reserve

- Established by the 1980 legislature at $1.0 million level for the cleanup and litigation of coastal, inland, and underground oil spills.

- Current balance is $385,000.

- Requested $550,000 for FY 86.

- Expenditures to date - $1.12 million.
  Revenues to date - $1.10 million.

- A major spill cleanup, such as at Nome, can cost $700,000

- Anticipated FY 86 expenditures from the reserve is $300,000.

2. Road Oiling Regulations

- New regulations will become effective May 2, 1985.

- Regulations prohibit the use of contaminated oil on roads as a dust suppressant.

- Regulations define prohibited levels of PCBs, lead, volatile aromatics, and halogenated organics in road oil.

- Analytical testing is required of all road oil and sample analysis must be submitted to DEC before road oil permit is granted.

- Approximately 2 million gallons of waste oil is generated in Alaska per year.

- Approximately 1 million gallons is applied annually to roads in Alaska.

- EPA has stated their intent to ban road oiling throughout the U.S. by May 1987.

- EPA is now reviewing the federal hazardous and solid waste amendments of 1984 to determine whether Alaska and more than 30 other states will be allowed to issue road oiling permits this summer.

- Alternate dust suppressants exist and are in use throughout Alaska.

- Alternate methods of waste oil disposal exist (e.g. burning) but unresolved and logistical problems may limit their use in Alaska.

DD9/sm

Neve'/Wood/Kelton/Hungerford

Alaska Oil and Gas Association

505 W. Northern Lights Boulevard
Suite 219
Anchorage, Alaska 99503-2553
(907) 272-1481

December 11, 1984

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Dr. Richard A. Neve', Commissioner
Alaska Department of Environmental
Conservation
Pouch O
Juneau, Alaska 99811

Dear Commissioner Neve':

Pursuant to our meeting with Dave Walker on November 2, 1984, the attached material is intended to provide background information on the State's Hazardous Waste Program; the intent of SB503, Section 1; an explanation as to how the Degree of Hazard (DOH) approach differs from the Federal regulatory scheme; general issues associated with pursuing a regulatory approach substantially different from the Federal program; and sections of the regulations which need to be deleted to obtain a proper beginning vehicle.

Please feel free to contact me or Tom Brooks if we can provide additional information.

Very truly yours,

WILLIAM W. HOPKINS
Executive Director

WWH:TR2:211

Attachment

cc: Bob Martin w/attachment
Dave Walker w/attachment

ALASKA OIL AND GAS ASSOCIATION
DISCUSSION PAPER ON ADEC HAZARDOUS WASTE PROGRAM
DECEMBER, 1984

BACKGROUND

In 1981 the Alaska State legislature passed AS 46.03, charging the Alaska Department of Environmental Conservation with the task of developing Hazardous Waste Management regulations which are "consistent with and substantially equivalent to" federal regulations. AOGA was informed on November 24, 1981 that the Department would begin preparation of a "plan" for the State's Hazardous Waste Program. In May 1982 AOGA received the first draft of the State's proposed regulations at the May 28, 1982 Hazardous Waste Advisory Work Group Meeting (HWAWG). At this meeting, ADEC discussed its intent to establish a State program parallel to the Federal program; so convincing was ADEC that AOGA's representative reported:

> "ADEC very much wants their Program to be "consistent with and substantially equivalent to" the Federal Program. Although there was a difference of opinion regarding the interpretation of certain complex sections of the Federal Program, I am not as concerned about this difference as I was when I first reviewed the draft regulations. This is because it can be resolved with a close reading of the regulations. The important point is that the State intended to, and thought they had, interpreted the existing regulations. This significantly assuages my concern that the State had been trying to greatly expand their authority in this program, and trying to include regulatory requirements much more restrictive than the existing Federal Program. ADEC was not trying to expand their program, they were trying to interpret and parallel the Federal Program. Interpretation problems are resolvable with some time devoted to discussing the various sections of the regulations in detail, and utilizing the existing background documents from these same discussions which occurred at the Federal level."

It was not until February 7, 1983, that AOGA received the first draft of State regulations which reflected a "Degree of Hazard" (DOH) regulatory mechanism (a mechanism which is patterned after Washington State's program and is divergent from Federal regulations).

It is appropriate at this time to briefly reflect on Washington's Program. Their program began with passage of their Hazardous Waste Disposal Act in 1976. As a result, Washington's program and the Federal program were being developed simultaneously with the basis for Washington's Program being defined by statute.* The Act took the form of three pages of general directives regarding the identification and management of hazardous wastes. Principal among these directives was the establishment of the "two tiered" designation system or "designation-based on degree of risk". The fundamental basis for designating wastes with this early program was biological and other testing.

In late 1980, the issue was again before the Washington legislature. Unfortunately, its designation process was sufficiently complex to preclude any meaningful review by the legislators. There was no discussion at the legislative level of various alternative approaches that would satisfy the State's enabling act, nor was there any realization that the technical complexities of the State agency's program may have been overly complex to meet the need at hand. Fueling the controversy was the fact that a State site (Commencement Bay) was designated a priority cleanup site under Superfund and other examples of egregious past practices were brought to light during the public hearing process. It is likely that these past practices were illegal under either pre-existing State law or the RCRA regulations and would not have been prevented had the new regulations been in place. Nevertheless, public concern led to a demand for "an approach more stringent than the minimum federal requirements". Hence, in late 1980 the State legislature amended the original act to provide authority to bring the State regulations into federal compliance and did not allow the flexibility to parallel the federal program.

Washington State adopted on February 4, 1982, their present regulatory program. It is a combination of the original concept of waste designation based solely on testing and the Federal concept of designation based on rulemaking and simple testing. In its first few years of operation, the program captured 15% more wastes than the Federal RCRA program. Of the incremental wastes captured; most were designated as "dangerous" wastes; a classification not intended by the original State act to receive the comprehensive management strategy that was to be applied to State designated "extremely hazardous wastes" or Federally designated "hazardous wastes".

*NOTE: The U.S. EPA began formulating the national program (RCRA) in 1976. In 1980, RCRA was significantly amended to its present regulatory framework. At this time EPA decided that waste classification based on testing was inappropriate. For a detailed discussion as to EPA's rationale behind this decision, re: FR Vol. 45, #98/May 19, 1980 pages 33164-33165, and 33105.

In 1984, Washington enacted legislation which required the Department of Ecology to conduct studies regarding the "best management practices" for "dangerous" waste disposal. In the interim and until such time as "best management practices" regulations are in place (July 1, 1986) "dangerous" wastes may not be disposed of at commercial, off-site land disposal facilities. "Dangerous" wastes are now being stored or disposed of on site or must be shipped to RCRA disposal sites out of state.

In addition to the State being unable to facilitate the installation of a "dangerous" waste disposal site, the State has also been ineffective over an eight-year period in facilitating the acceptance and/or installation of an in-state disposal site for "hazardous or extremely hazardous" wastes.

Regarding the Alaska program, on March 3, 1983, AOGA informed Mr. Hungerford that the proposed rules of February 7, which reflected the DOH scheme from Washington State, were in need of in-depth technical review and notified him of forthcoming technical comments. On April 6, 1983, AOGA provided ADEC an in-depth technical review of the regulations. These comments were the culmination of extensive efforts by many engineers, marine biologists, toxicologists, attorneys and corporate management level individuals. The Department informed AOGA's representative on the Advisory Group that the ADEC could not expend the money or the manpower to consider AOGA's comments prior to release of a public hearing draft. On April 11, 1983, AOGA strongly requested that the regulations not be released until AOGA's comments could be reviewed and considered.

On April 19, 1983, the regulations were moved to public notice, with no apparent review or consideration of the technical comments provided to ADEC by AOGA. On April 25, 1983, Commissioner Neve' wrote AOGA indicating that the "comments of every member of the work group...were reviewed seriously and did help significantly in the preparation of these draft regulations". On May 25, 1983, at the Public Hearing AOGA stated that we felt that there was a lack of consideration of our industry's input in the development of the April 11, 1983, draft regulations.

By June 8, 1983, AOGA had provided ADEC with extensive oral and written testimony which was developed by the Environmental Committee in conjunction with the following industry experts:

- Joan DiNal, Senior Counsel, Environmental Affairs for Atlantic Richfield Company.
- Michael Hulse, Environmental Analyst, IMCO Services.
- James P. Ray, Ph.D., Manager of Environmental Sciences Support, Shell Oil Company.

- Robert E. Abbott, Ph.D., Coordinator of Environmental Affairs, Conoco Inc.
- Philip Dorn, Ph.D., Shell Development Company.
- Ilene Danse, M.D., Senior Advisor, Environmental Health Protection, Chevron Environmental Health Center, Inc.

The Department issued their latest draft in October 1983 which failed again to address significant concerns which have been repeatedly expressed by our industry. The Department has accepted AOGA's comments on three sets of draft regulations and failed to address the problems identified by AOGA.

AOGA next presented its case to the legislature. During this process, AOGA participated in the drafting of SB503, a piece of legislation which involved a compromise between members of the environmental community, small business, ADEC, AOGA, Labor, the Governor's Office, Sen. Fahrenkamp's office, etc., on key issues, one of which was DOH vs. the Federal Program.

INTENT OF SB503, SECTION 1

The compromise reached between the various parties for the management and control of hazardous waste in Alaska was a very delicate one. Because the legislature did not desire any confusion over the intent of this legislation, it adopted a Letter of Intent drafted by the Senate Resources Committee. The intent of the Legislature was for the Department of Environmental Conservation to "evaluate the most appropriate mechanism by which to identify a waste characteristic of toxicity, persistence or carcinogenicity and other characteristics identified as hazardous by the EPA". In order for a proper and complete analysis to be performed, no prior assumptions can be made as to the "appropriate mechanism" to be used by the State in its hazardous waste program.

Any regulations that are ultimately developed by the Department "must incorporate the results of this analysis" according to the intent letter. The Legislature, by the action of adopting this wording, instructed the Department to make an analysis and evaluation with no preconceived bias or ideas as to the appropriate mechanisms and only after the analysis is completed are the regulations to be drafted.

In summary, the Legislature has instructed ADEC to begin anew on identifying the regulatory mechanism of waste designation.

EXPLANATION OF DOH VS. RCRA

On May 19, 1980, EPA promulgated RCRA regulations that designated wastes by a formal rulemaking process (lists) and four reproducible and supportable characteristic tests. They reviewed various DOH programs and concluded a DOH approach was not an appropriate waste designation mechanism. To qualify for interim authorization, a state program had to encompass all RCRA wastes. In Washington, the two approaches were consolidated, resulting in the most complex designation system in use in the nation.

To briefly summarize, the DOH program is based on the concept that different wastes should be regulated with different procedures based on the degree of risk presented to human health and the environment, as demonstrated by existing biological and other test data or test results produced by generators. Initially, when the DOH approach was being developed it was envisioned that such data would be the sole basis for designating wastes, and that testing (bioassay, etc.) would be mandatory for all generators.

Although not specifically a designation issue, it must be kept in mind that nationally the small quantity generator exclusions are now much lower. If applied to Alaska, particularly without any special provision for small quantity generators, the combination of a much lower quantity exclusion and an extremely complex designation mechanism will result in an unenforceable program.

One of the difficulties inherent in the DOH designation procedure is that there is no adequate or simple means to describe how the federal and state universes of waste compare. No straightforward comparison can be made between a given category of federal wastes and categories defined under the state program. Consequently, the waste generator would often need to retain expert assistance. For example, professional assistance is especially recommended in instances where a waste not regulated under RCRA has "flunked" the state's proposed toxicity bioassay test. Determinations must be made regarding whether the test animals responded adversely to the potential toxic constituents or whether a physiological response to test conditions was involved. Such determinations will be subjective and inconsistent.

Technical complexities aside, the legal theory underlying the DOH regulations represents a marked departure from that embodied in the federal RCRA regulations. The federal regulations specify the criteria that the EPA administrator will consider in adding wastes to the lists in the RCRA regulations. The administrator is to consider potential wastes from the standpoint of toxicity, persistence, bioaccumulation, genetic effects, etc., and then to add appropriate wastes through formal rulemaking procedures. Thus, EPA's approach for developing hazardous waste lists inherently addresses biological considerations but centralizes the testing under EPA.

In contrast, DOH regulations place the burden on each generator to determine whether a waste not otherwise encompassed by the RCRA regulations is part of the state universe of wastes, and as previously stated, this determination may be made based on uncertain test results.

An individual generator's determination that a waste not regulated by RCRA might, for biological or other reasons, be regulated under the DOH regulations does not lead to a conclusive rulemaking. Thus, the process of identifying state regulated wastes is not accompanied by the certainty and procedural due process protections that characterize the listing process at the federal level.

A legal burden of designation is not to be confused with the cost burden of testing. Under both the federal and state regulations, the generator pays testing costs, as is typical of most environmental programs.

A major difficulty with the DOH designation system is that it creates an area of legal and technical vagueness. For example, biological test data can be inconclusive with regard to actual toxicity. The test animals may react adversely to test conditions rather than to the suspected toxic constituents, thus resulting in the over-designation of wastes. To further complicate the bioassay issue, there are no standard bioassay procedures which have been accepted by the scientific community at large. Difficulties may arise if a generator relies on an initial series of bioassay test results that show a waste to be nonhazardous. A subsequent test on the same waste yielding a positive determination of toxicity by the same or yet another generator may result in liability to the generator, who relied on the first series of tests in good faith. In either case, the uncertainties involved in the biological response of laboratory test animals to potentially toxic wastes may create a large gray area of potential liability for generators.

Under the State's proposed regulations, a generator may apply to the state agency for a determination of hazardous or nonhazardous status of a given waste. (This procedure is specific to the individual generator and does not provide notice or opportunity for comment from other generators of similar or related wastes and the scientific community at large.) However, such a certification would still not shield the generator from potential liability in the event of an erroneous certification by the state agency. Again, this ad hoc certification process cannot be viewed as a substitute for the certainty inherent in the federal designation system. In summary, the DOH generator is truly "at risk" to a degree not experienced by generators in the rest of the nation.

GENERAL ISSUES ASSOCIATED WITH PURSUING A REGU TORY APPROACH SUBSTANTIALLY DIFFERENT THAN THE FEDERAL PROGRAM

A substantial departure from the Federal and national trend in hazardous waste management by Alaska will make the State's program continually fraught with inherent technical, legal, and economic problems. Such a program will not be as readily able to take full advantage of the continued evolution or efforts of the Federal program.

The technical aspects of the national program is not the product of a few staff specialists or even the combined effort of one or two states. Rather, the Federal program has been and will continue to be the product of a concerted effort by this country's regulatory agencies, academic/scientific community, private industrial sector and environmental organizations. This effort cannot begin to be equaled by any single state.

As you are probably aware, the management of hazardous wastes is technically and legally complicated and highly controversial. Should the State embark on a program substantially different than the Federal program, Alaska will have to expend considerable amounts of time and resources in pursuing the continued development of a program which will be fraught with continuing implementation, legal, educational and enforcement problems. On the other hand, a state program that parallels the national trend can take full advantage of the billions of dollars this country has and will continue to spend in further evolving and implementing hazardous waste regulations.

Again, a state that is contemplating an approach that differs fundamentally from the Federal program should consider the following questions:

- Will the alternative program, if based on fundamentally different technical theories, isolate the state from the larger body of developing scientific expertise at the national level?
- Will the alternative program, if based on different legal theories, create the need for a divergent trend of judicial interpretation and thereby isolate the state from legal developments at the national level?
- How will a fundamentally different program that is more expansive than its federal counterpart be reconciled with related programs such as Superfund that provide mechanisms for partial federal funding for incidents involving federally designated waters?

- How will the fundamentally different state program relate to the interstate aspects of hazardous waste transport and management? This involves issues of reciprocity and the equity of burdening another state's disposal facilities if the state of origin has not provided ample sites for its own wastes.

- How will a fundamentally different state program be modified to remain consistent with evolving RCRA requirements?

- Does the fundamentally different state program exacerbate the interstate problems of hazardous waste management?

- What is EPA's enforcement interest in an incident involving a nonfederal waste that is considered hazardous in the state of origin but not in the state where the incident occurs? This issue stems from the fact that authorized state programs operate in lieu of RCRA regulations.

- To what extent would a fundamentally different program be delayed in obtaining final authorization?

- Will funding levels by the State be adequate to implement and maintain a program that is technically and legally divergent from the Federal program?

SECTIONS TO BE DELETED TO OBTAIN A PROPER BEGINNING VEHICLE

The following is intended as a list to highlight those major portions of the October 26, 1983, draft which should be deleted, pending a detailed evaluation by the Department:

- 18 AAC 62.010 Definition of Hazardous Wastes
- 18 AAC 62.030 Lists of Hazardous Wastes
- 18 AAC 62.050 Discarded Chemical Products
- 18 AAC 62.060 Characteristic of Toxicity
- 18 AAC 62.070 Characteristic of Persistence
- 18 AAC 62.080 Characteristic of Carcinogenicity
- 18 AAC 62.120 Waste Extraction Procedure (WEP) Characteristic
- 18 AAC 62.140 Exclusions
- Article 5 - Management of Moderate Risk Wastes

For a more detailed discussion, attached are both oral testimony and detailed written comments which were provided to the Department at the May, 1983 Public Hearing.

In addition, attached is an article from the October 26, 1984, Environmental Reporter, entitled EPA Staff Summary of 1984 Amendments to Resource Conservation and Recovery Act. This recent reauthorization addresses the majority of the real or perceived "loopholes" in the RCRA regulations. The reauthorization amendments only reinforce ACGA's contention that the nation's commitment to properly manage hazardous waste is real and a divergence from the Federal program is unnecessary.

tr2:220
Attachments

Alaska Health Project

Providing information about hazardous materials on the job and in the community.
417 West Eighth Avenue, Anchorage, Alaska 99501 (907) 276-2864

April 25, 1985

APR 2 9 RECD

Representative Mike Davis
Pouch V
Juneau, Alaska 99811

Dear Representative Davis:

Alaska Health Project appreciates your interest in issues concerning hazardous wastes in Alaska. As you may know, I have been directly involved with this issue for about three years at both the state and local level. Reflecting on my involvment in this area brings to mind the need for the Legislature to become more educated about the issue and for the Legislature to decide whether it deems hazardous wastes a priority concern for the future. It is my hope that the oversight hearings, or hearings of that type become the vehicle for this type of education. Further, it is my hope that the Legislature attack that hazardous waste issue in a similar fashion to the way it investigated proposals to develop a full scale petrochemcial industry several years ago. The hazardous waste issue deserves legislative commitment and coordination with state and local agencies, the public and industry.

It is important, in my opinion, that Alaska work hard to develop a preventive approach to hazardous waste, rather than falling into a dangerous trap of simply developing a program that reacts to hazardous materials incidents.

In light of this, certain testimony at the teleconference concerned me. While I agree with industry on the need for some sort of a hazardous waste disposal facility in Alaska (not necessarily a landfill) and with their concern regarding the current time frame for selecting a site, I do not wish to see the development of a site supersede development and implementation of a "total" state hazardous waste program. To develop a disposal facility without a state definition for when a solid waste becomes hazardous could result in serious technical, legal, and political problems down the road.

While I am the first to admit that management programs (such as a disposal site) are perhaps dollar for dollar better at solving problems than a regulatory approach, central to any management approach is a regulatory foundation, which the state currently lacks. It is important that the state define, by regulation, when a waste becomes hazardous thus allowing Alaska to decide on hazardous waste management approaches. Determining

a state definition for hazardous wastes will also help industry with their plans to manage wastes as well as provide incentives for industry to reduce their wastes streams or investigate alternative processes which do not create a hazardous waste as defined by the State of Alaska.

Last year The Department of Environmental Conservation published a set of hazardous waste regulations which define hazardous waste by degree of hazard. While admittedly controversial, this approach provides a good starting point for future discussions. Regardless of the fact that earlier debates addressing this definition scheme resulted in a "cold war" relationship between industry and public interest organizations, it is important to confront this issue directly. Once the state can settle on a hazardous waste definition, all other aspects of the program will fall into place.

Once again, I sincerely appreciate your interest in this issue and I am available to discuss this issue with you at any time.

Cordially,

David Wigglesworth
Occupational Health Specialist

cc: Commissioner Ross
Committee Members

Statement by ARCO Alaska, Inc.
for Presentation to the
House Oil and Gas Committee
April 24, 1985

By Dr. T.R. Fink, Manager
Environmental Conservation

Waste categories

Waste materials are regulated by both Federal and State requirements. In general, the Federal requirements pertain to hazardous wastes and the State requirements to non-hazardous wastes. All wastes should be handled in an environmentally sound manner. All wastes do not require the same degree of environmental protection.

Wastes are considered hazardous if they are listed as such by the Environmental Protection Agency of if they meet certain characteristics for ignitability, corrosivity, reactivity or toxicity. Diesel fuel and acids are two examples that, when discarded, meet the hazardous characteristics. Household garbage and sewage are solid wastes, not hazardous waste. Drilling mud is a waste common in our industry which is a solid waste but not a hazardous waste.

Alaska must develop a hazardous waste disposal site in the State

There is no hazardous waste disposal site available for general use in Alaska. Even if the various entities involved in the hazardous waste issue in Alaska were to agree on the definition of hazardous waste, the procedures for regulating hazardous waste, and the means for cleaning-up abandoned hazardous waste sites, the hazardous waste problem in Alaska will not be resolved until there is a viable disposal option in Alaska. Costs, legal and technical restrictions and political considerations associated with shipping hazardous waste to the Lower 48 preclude it from being the answer for Alaska's hazardous waste.

The State of Alaska must be involved in the development of a hazardous waste management facility

NIMBYS - Not In My Back Yard Syndrome - is alive and well in Alaska. For a hazardous waste management facility to be developed in Alaska, the State of Alaska must be heavily involved. With the active involvement of the State we can take the most important step toward solving Alaska's hazardous waste problems.

The SB 503 timeframe for hazardous waste siting is too slow

SB 503 requires disposal options and sites to be selected by 1989. After disposal options and sites are selected, the permitting and construction phases will require four to five years to complete. Alaska can not afford to wait until the early 1990's to have a safe, permitted disposal option for Alaska hazardous waste.

The 1984 amendments to the Federal hazardous waste program have forced the siting issue to the forefront. The 1984 Federal amendments phase out land disposal, greatly increase the number of hazardous waste generators, require the study and listing of additional materials as hazardous waste, add a citizens's suit provision and increase the penalty provisions. The Amendments increase the cost and decease the options currently available for disposal in the Lower 48. There is no statewide hazardous waste disposal site available in Alaska.

A Governor appointed executive level committee is needed

The hazardous waste siting issue can best be resolved by a Governor appointed executive level committee with representatives from DEC, DNR, local government, environmental groups and industries. The task of the committee would be to develop a plan of action for siting a hazardous waste management facility in Alaska.

MEMORANDUM State of Alaska

TO: Ms. Billie Trent
Administrative Assistant
Department of Environmental
Conservation-Juneau

DATE: February 8, 1984

FILE NO: 122-548-84

TELEPHONE NO: 276-3550

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: State v. Transportes del Este Navegacion, S.A., et al.

By: LL
Madeleine R. Levy
Assistant Attorney General
Natural Resources Section-Anchorage

The recent oil spill from the M/V Cepheus and the hearing on the temporary restraining order (T.R.O.) in that case point out the imminent need to amend AS 46.03.770 and AS 46.03-.765. Section 770 provides for detention of a vessel without warrant for security for oil spill damages assessed under AS 46.03.760(b) as that latter statute existed prior to the 1976 amendments. Under 770, a vessel may be released after posting a bond not to exceed $100,000.00. Prior to 1976, AS 46.03.760(b) permitted the court to assess liquidated damages for an oil spill not to exceed $100,000.00, so the limitation of a bond to $100,000.00 under 770 made sense at that time.

However, in 1976, the legislature repealed and re-enacted AS 46.03.760(b). § 9, ch. 220 SLA 1976. The re-enacted version eliminates <u>any</u> reference to a maximum amount of damages; it states only that damages assessed under section 760 may not be punitive and must be remedial and compensatory in nature. Section 770 should have been contemporaneously repealed and re-enacted to provide for a bond not to exceed the maximum amount of damages available under newly enacted 46.03.760 and 46.03.822. Unfortunately, section 770 was left untouched, but not unaffected, by the 1976 legislative changes.

The above discrepancy came to the forefront when we asked the court to grant the T.R.O. enjoining the Cepheus under AS 46.03.765 from leaving the port of Anchorage until it had complied with the requirements of AS 46.04.040(c) by posting a twenty million dollar bond. Attorneys for the Cepheus' owners argued that the proper remedy was not the requested injunctive relief but, rather, detention and release after posting $100,000.00 bond under AS 46.03.770. While we did prevail on our argument in front of Judge Shortell, we might not be so fortunate in the future. Since section 770 is a vestigial remnant emptied of meaning after the 1976 re-enactments contained in ch 220 SLA 1976, your department should request a bill repealing section 770 as a technical, corrective measure. I would urge you to seek such legislative relief immediately. In order to preserve detention

Department of Law Summary

of a vessel as a remedy under AS 46.03.765, I would suggest requesting the legislature to insert the following language in section 765 when and if 770 is repealed:

> Sec. 46.03.765. Injunctions. The superior court has jurisdiction to enjoin a violation of this chapter or AS 46.04, or of a regulation, a lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter or AS 46.04. In actions brought under this section, temporary or preliminary relief, INCLUDING DETENTION OF A VESSEL, may be obtained upon a showing of an imminent threat of continued violation, and probable success on the merits, without the necessity of demonstrating physical irreparable harm. The balance of equities in actions under this section may affect the timing of compliance, but not the necessity of compliance within a reasonable period of time.

Please let me know if the Department of Law can be of further assistance in this regard.

MRL:cai

cc: Dick Neve'-Commissioner, DEC
Chris Noah-Deputy Commissioner, DEC
Ron Lorenson-Deputy Attorney General
Bob Martin-Deputy Director, DEC

Alaska State Legislature
Senate Transportation Committee

Sen. John B. (Jack) Coghill, Chairman
Sen. Paul Fischer, Vice-chairman
Sen. Mitch Abood
Sen. Jan Faiks
Sen. Joe Josephson

Pouch V
Juneau, Alaska 99811

January 22, 1986

TO: All Committee Members

FROM: Committee Staff

RE: Sectional Analysis of H.B. 100

H.B. 100 makes technical, corrective amendments to Title 46; Chapter 3; Section-7 Prohibited Acts and Penalties.

Section 770 of AS 46.03 provides for detention of a vessel without warrant for security for oil spill damages assessed under AS 46.03.760(b).
Currently under this section, posting a bond of not over $100,000 may release a detained vessel. This section is inconsistent with the 1976 amendment to AS 46.03.760, which requires that the amounts assessed be "compensatory and remedial in nature" and not used for punitive purposes. A simultaneous amendment should have been made to AS 46.03.770, but did not occur.

This gap may allow a vessel to post a bond of $100,000, be released from detention, and leave millions of dollars of environmental damage behind

Section 1: Deletes the current $100,000 ceiling and sets the bond at

"an amount not to exceed the maximum amount of damages available under

AS 46.03.758, 46.03.760 and 46.03.822."

AS 46.03.758 pertains to civil penalties for discharges of oil.

AS 46.03.760 pertains to civil action for pollution; damages.

AS 46.03.822 pertains to strict liability for the discharge of hazardous

substances. (Statutes attached.)

Section 2: This amendment is another housekeeping measure. It amends AS 46.03.826(5) defining what actions constitute control of a vessel that will create strict liability for the discharge of hazardous substances under AS 46.03.822.

AS 43.826 only defines what "having control over a hazardous substance" entails; the phrase "owning or" is superfluous to the definition and has been deleted.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : 1/9/86

REQUEST

Bill/Resolution No. : HB 100
Title : Detention of vessels as security for oil pollution damages

Sponsor : House Rules for Governor
Requestor :
Date of Request :

FISCAL DETAIL

Agency Affected : ADEC
BRU : Environmental Quality

Components :

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS : NONE

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Billie Trent — Phone : 465-2600
Division : Office of the Commissioner — Date : January 9, 1986

Approved by Commissioner : Bill Rose — Date : January 9, 1986
Agency : Department of Environmental Conservation

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

Ross/Trust/O'Brien
copy copy

BILL SHEFFIELD, GOVERNOR

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☒ POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

May 2, 1985

RECEIVED
MAY 3 1985
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

Honorable Marco Pignalberi
Alaska State House of Representatives
Pouch V
Juneau, Alaska 99811

Re: Due process and seizure of boats
File No. 366-477-85

Dear Representative Pignalberi:

We are responding to your request for opinion concerning the constitutionality of AS 46.03.770 which authorizes the detention of a vessel which has illegally discharged oil or ballast water; by the terms of § 770, the detention may occur in advance of a hearing to contest the propriety of the detention. You raised this question at a hearing of the House Transportation Committee on HB 100 on the morning of May 1, 1985.

The question was resolved by the Alaska Supreme Court in the case of F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), which involved a forfeiture proceeding brought against a boat for alleged violations of Alaska's laws regarding the king crab fishery. The vessel was seized by state officials on January 15, 1976 while it was unloading crab in Pelican. The state thereafter filed a complaint for forfeiture of the vessel.

The Alaska Supreme Court held as follows:

> The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. [citation omitted] Where property allegedly used in an illicit act is confiscated by government officials pending a forfeiture action, no notice or hearing is necessary prior to the seizure. [citation omitted] However, when the seized property is used by its owner in earning a livelihood, notice

> and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent.

Id. at 666-667.

The American Eagle case involved a statute which, like AS 46.03.770, does not set forth detailed procedures for contesting seizures; rather, an aggrieved owner may proceed under any statute, court rule or legal theory that will afford redress, or the state may bring the matter before the court, as usually occurs. Significantly, the court in American Eagle applied a hindsight test under which it does not require the legislature to map out in advance the administrative or judicial procedures to be followed after a seizure. So long as there is, in fact, "notice and opportunity for hearing at a meaningful time to minimize possible injury," there is no violation of due process. The Alaska Supreme Court reaffirmed these principles last year in State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984).

If we may be of further assistance to you, please do not hesitate to call upon us.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Thomas M. Jahnke
Thomas M. Jahnke
Assistant Attorney General

TMJ:jf

cc: Honorable Bill Ross
Commissioner
Department of Environmental
Conservation

Madeline Levy
Assistant Attorney General
Anchorage, AGO

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

Telephone:(907)
Address:
(907) 465-2600

OFFICE OF THE COMMISSIONER
POUCH O, JUNEAU, ALASKA 99811

January 10, 1986

The Honorable Jack Coghill
Chairman, Transportation Committee
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Senator Coghill:

This letter is in reference to HB 100 (detention of vessels for oil spill violations) which is now before your committee for consideration. A copy of the bill is enclosed.

This legislation corrects an oversight which occurred when AS 46.03.760(b) was amended in 1976 to remove any ceiling for assessed oil spill damages. A simultaneous amendment should have been made to AS 46.03.770, removing the ceiling on bond limitations pending damage judgments, but that did not happen.

The effect of that oversight is that, while we could detain a vessel to secure $30 million in oil spill damages, that vessel could be released after posting the $100,000 maximum bond now required under § 770.

This serious discrepancy was discovered in January 1984 when the Greek vessel M/V CEPHEUS went aground near Anchorage, spilling in excess of 300,000 gallons of oil into Alaska waters. The State then sought a temporary restraining order and a $20 million bond under AS 46.04.040. Judge Shortell awarded the requested bond only because the vessel was planning to offload in Alaska waters. Had the vessel planned to simply leave Alaska, he would probably have allowed it to do so after posting the $100,000 bond.

DEC Position Paper

After the close call in the courtroom, the Attorney General's office suggested immediate amendment to § 770. It was stated that:

> Section 770 should have been contemporaneously repealed and reenacted [with § 760(b)] to provide for a bond not to exceed the maximum amount of damages available under newly enacted 46.03.760 and 46.03.822. Unfortunately, section 770 was left untouched, but not unaffected, by the 1976 legislative changes.

I trust this summary conveys the importance of this legislation, but please let me know whether you require anything further. I would appreciate your using your good offices to see that this bill receives a hearing in your committee early enough in the session to assure its becoming law this year.

Sincerely,

Bill Ross
Commissioner

Enclosure
cc: Hal M. Brown, Esq.
Attorney General

Mr. James R. Ayers
Director, Legislative Relations
Office of the Governor

Rossi/Trivett/O'Brien
copy copy

BILL SHEFFIELD, GOVERNOR

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PHONE: (907) 465-3600

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

May 2, 1985

Honorable Marco Pignalberi
Alaska State House of Representatives
Pouch V
Juneau, Alaska 99811

Re: Due process and seizure of boats
File No. 366-477-85

Dear Representative Pignalberi:

We are responding to your request for opinion concerning the constitutionality of AS 46.03.770 which authorizes the detention of a vessel which has illegally discharged oil or ballast water; by the terms of § 770, the detention may occur in advance of a hearing to contest the propriety of the detention. You raised this question at a hearing of the House Transportation Committee on HB 100 on the morning of May 1, 1985.

The question was resolved by the Alaska Supreme Court in the case of F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), which involved a forfeiture proceeding brought against a boat for alleged violations of Alaska's laws regarding the king crab fishery. The vessel was seized by state officials on January 15, 1976 while it was unloading crab in Pelican. The state thereafter filed a complaint for forfeiture of the vessel.

The Alaska Supreme Court held as follows:

> The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. [citation omitted] Where property allegedly used in an illicit act is confiscated by government officials pending a forfeiture action, no notice or hearing is necessary prior to the seizure. [citation omitted] However, when the seized property is used by its owner in earning a livelihood, notice

> and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent.

Id. at 666-667.

The American Eagle case involved a statute which, like AS 46.03.770, does not set forth detailed procedures for contesting seizures; rather, an aggrieved owner may proceed under any statute, court rule or legal theory that will afford redress, or the state may bring the matter before the court, as usually occurs. Significantly, the court in American Eagle applied a hindsight test under which it does not require the legislature to map out in advance the administrative or judicial procedures to be followed after a seizure. So long as there is, in fact, "notice and opportunity for hearing at a meaningful time to minimize possible injury," there is no violation of due process. The Alaska Supreme Court reaffirmed these principles last year in State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984).

If we may be of further assistance to you, please do not hesitate to call upon us.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Thomas M. Jahnke
Thomas M. Jahnke
Assistant Attorney General

TMJ:jf

cc: Honorable Bill Ross
Commissioner
Department of Environmental
Conservation

Madeline Levy
Assistant Attorney General
Anchorage, AGO

Ross/O'Brien/Trent copy

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

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☒ *POUCH K - STATE CAPITOL*
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 7, 1985

The Honorable John Sund
Alaska State House of Representatives
Pouch V
Juneau, Alaska 99811

Re: HB 100

Dear Representative Sund:

In a meeting of the House Resources Committee on HB 100 yesterday, there was some uncertainty about section two of the bill, which deletes the words "owning or" from AS 46.03.826(5). That provision currently provides that "owning or having control over a hazardous substance means producing, handling, storing, transporting or refining a hazardous substance...."

The problem the definition creates is this: The law imposes strict liability for hazardous substance spills on two classes of persons: (1) those who hold title to the substance, i.e., the owners; and (2) those who have control of the substance, e.g., the transporters or refiners. See AS 46.03.822. However, AS 46.03.826(5) defines "owners" to include only producers, handlers, storers, transporters or refiners; the definition of "owners" omits from the list of liable persons that person who actually has title to the substance. That omission may let the actual owner of the hazardous substance (who is blameworthy for selecting the handlers, transporters and refiners) off scot-free if a spill occurs.

The word "owner" has a clear definition in the common law and common usage. It is not necessary to define the term in the statute because the common law and common usage provide the definition applied in the Alaska courts. AS 01.10.010; AS 01.10.040. By removing the term from the definition section, we preserve its commonly-understood meaning and insure that both the owner's agents and the owner may be held strictly liable for

hazardous substance spills. This amendment is essential to insure the correct application of the law in the courts.

Thank you for you attention to our concerns.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Thomas M. Jahnke
Thomas M. Jahnke
Assistant Attorney General

TMJ:jf

cc: Honorable Bill Ross
Commissioner
Department of Environmental
Conservation

Madeline Levy
Assistant Attorney General
Anchorage, AGO

Alaska State Legislature

Fourteenth Legislature — Second Session

Senate Calendar

THURSDAY
February 27, 1986
11:00 a.m.

Official Business of the Senate

Forty-sixth Legislative Day

Chaplain: Reverend Loren Jones of Chapel by the Lake Church

SENATE BILLS IN SECOND READING

CSSB 278(FIN)	Impoundment and registration of motor vehicles; senior citizen motor vehicle tax exemptions; licensing of certain drivers; fees for drivers licenses and permits; refusal to submit to a chemical test for intoxication; and the drivers license compact (with Senate Letter of Intent) Held from 2/26

SECOND READING OF HOUSE BILLS

HB 100	Detention of vessels as security for oil-pollution damages; clarifying a definition relating to discharge of hazardous substances eff. date Transportation report pg 1616 Resources offered SCS pg 1913
CSHB 240(HESS) am	Overtaking and passing school buses Transportation offered SCS pg 1928

Publication Notice

Honoring - Anderson High School 1986 Girls Basketball Team by Senator Coghill and Representative Shultz

Honoring - Edward A. Merdes by Representatives M.W. Miller, Ringstad, Frank, Fuller, Binkley, Koponen, Collins, Hurley, M.M. Miller, Duncan, Gruenberg, Cato; Senator Bennett

Honoring - Paige Adams by Representatives Hurley, Larson and Navarre; Senators Kerttula and DeVries

HOUSE BILL 100

DETENTION OF VESSELS FOR OIL SPILL VIOLATIONS

BEFORE THE ALASKA SENATE
February 27, 1986
11:00 a.m.

PURPOSE

HB 100 makes AS 46.03.770 consistent with itself, and with AS 46.03.760, to assure that the State will have enough "money in hand" to cover any damage done in the event of an oil spill.

BACKGROUND

When enacted, AS 46.03.760 provided for penalties not to exceed $100,000. In 1976, that statute was amended to remove any ceiling on assessed damages, but AS 46.03.770 retains an outdated reference to AS 46.03.760 and limits to $100,000 any bond posted in lieu of vessel detention.

This renders § 770 inconsistent with itself, and the reference to 760(b) no longer makes sense.

Under the current law, the State could hold a vessel to secure $30 million in oil spill damages, but that vessel could leave Alaska after posting a $100,000 bond. Such a scenario does not provide the type of cost recovery guarantee that adequately protects state interests.

IMPETUS FOR HB 100

This serious discrepancy was discovered when the Greek vessel M/V CEPHEUS went aground near Anchorage, spilling in excess of 300,000 gallons of oil into Alaska waters.

The judge in that matter ruled that a $20 million bond was necessary (based on the $20 million financial responsibility requirement elsewhere in the law) because the vessel planned to continue offloading in Alaska waters. Had the vessel planned to simply leave Alaska, he would probably have allowed it to do so after posting the $100,000 bond.

AS 46.03.770 should have been contemporaneously repealed and reenated with § 760(b) to provide for a bond not to exceed the maximum amount of damages available under newly enacted 46.03.760 and 46.03.822.

---

*Sec. 2, amending AS 46.03.826(5), merely restores the original, common sense meaning of the term "owner."

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

OFFICE OF THE ATTORNEY GENERAL

November 26, 1984

M E M O R A N D U M

TO: Honorable Bill Sheffield
Governor

FROM: Norman C. Gorsuch
Attorney General

RE: Attached bill regarding detention of vessels for security for oil-pollution damages
Our file: 377-001-85

Attached is a bill that was requested by the Department of Environmental Conservation, and approved by your office on July 30, 1984. The bill simply makes the bond posting provision in the statute on detention of vessels involved in oil spills consistent with the 1976 amendment of the statute providing for damages for oil pollution. This is intended as a simple, but important, housekeeping amendment.

A nearly identical bill, SB 534 (Department of Law file no. 377-136-84), was prepared by this department last year, and was introduced by the Senate Resources Committee. That bill was still in committee when the legislature adjourned. The version which is presented now adds one technical change. Section 2 clarifies the definition of "owner" with regard to strict liability for oil spills and other hazardous substances. This, too, is merely a technical housekeeping amendment.

Also attached is a draft transmittal letter to the legislature.

NCG:MRL:md

cc w/enc.: Hon. Richard Neve'
Commissioner
Department of Environmental
Conservation

Madeleine R. Levy
Assistant Attorney General
Natural Resources Section
Anchorage

D R A F T

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the detention of vessels as security for oil-pollution damages and clarification of a definition relating to discharge of hazardous substances. This bill is intended to correct two statutory oversights brought to light as a result of the January 21, 1984 oil spill from the M/V Cepheus.

AS 46.03.760, providing for civil actions for pollution, and AS 46.03.770, providing for detention of vessels as security for oil-pollution damages, were both enacted by ch. 120, SLA 1971. As enacted, AS 46.03.760(b) set a maximum of $100,000 for liquidated damages to be assessed by the court in an oil-pollution case. And, as enacted, AS 46.03.770 provided for the court to release a detained vessel upon posting of a bond set by the court in an amount not to exceed $100,000. AS 46.03.770 referred to AS 46.03.760(b), and the two $100,000 provisions were compatible with each other.

However, in 1976, along with other amendments, AS 46.03.760(b) was amended to remove the $100,000 liquidated damages maximum, but AS 46.03.770 was not correspondingly amended. It has never been amended. This bill seeks to correct that oversight. It removes the reference to $100,000 and inserts a reference (in two places) to the

relevant civil penalty and damages statutes that were enacted and amended after AS 46.03.770 was enacted.

Second, AS 46.03.822 provides for strict liability for the discharge of hazardous substances, including oil, for a person owning or having control over the hazardous substance prior to its discharge. "Owning or having control over a hazardous substance" is presently defined in AS 46.03.826(5) in a manner which arguably negates the common sense definition of an owner. Section 2 of this bill corrects that problem by eliminating the word "owner" from the statutory definition section, thereby restoring the original meaning of that word.

Sincerely,

Bill Sheffield
Governor

1976 -

Offered: 2/24/86
Referred: Rules

Original sponsor: Rules/Governor

IN THE HOUSE BY THE RESOURCES COMMITTEE

SENATE CS FOR HOUSE BILL NO. 100 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to detention of vessels as security for oil-pollution damages; clarifying a definition relating to discharge of hazardous substances; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 46.03.770 is amended to read:

Sec. 46.03.770. DETENTION OF VESSEL WITHOUT WARRANT AS SECURITY FOR DAMAGES. A vessel that [WHICH] is used in or in aid of a violation of AS 46.03.740 - 46.03.750 may be detained after a valid search by the department, an agent of the department, a peace officer of the state, or an authorized protection officer of the Department of Fish and Game. Upon judgment of the court having jurisdiction that the vessel was used in, or was the cause of, a violation of AS 46.03.740 - 46.03.750 with knowledge of its owner or under circumstances indicating that the owner should reasonably have had this knowledge, the vessel may be held as security for payment to the state of the amount of damages assessed by the court under AS 46.03.758, 46.03.760, and 46.03.822. If [AS 46.03.760(b), AND IF] the damages [SO] assessed are not paid within 30 days after judgment or final determination of an appeal, the vessel shall be sold at public auction, or as otherwise directed by the court, and the damages paid from the proceeds. The balance, if any, shall be paid by the court to the owner of the vessel. The court shall permit the release of the vessel upon posting of a bond set by the court in an amount not to exceed the maximum

amount of damages available under AS 46.03.758, 46.03.760, and 46.03.822 [$100,000]. The damages received under this section shall be transmitted to the proper state officer for deposit in the general fund. A vessel seized under this section shall be returned or the bond exonerated if no damages are assessed under AS 46.03.758, 46.03.760, or 46.03.822 [AS 46.03.760(b)].

* Sec. 2. AS 46.03.826(5) is amended to read:

(5) "[OWNING OR] having control over a hazardous substance" means producing, handling, storing, transporting, or refining a hazardous substance for commercial purposes immediately before entry of the hazardous substance in or upon the waters, surface, or subsurface lands of the state, and specifically includes bailees and carriers of a hazardous substance;

* Sec. 3. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Introduced: 2/6/76
Referred: Resources

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

SPONSOR SUBSTITUTE FOR SENATE BILL NO. 267 am H (e.date added) re-engrossed

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the Department of Environmental Conservation; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 46.03.020(10)(C) is amended to read:

(C) protection of public water supplies by establishing minimum drinking water standards, and [SETTING] standards for the construction, improvement, and maintenance of public water supply systems;

* Sec. 2. AS 46.03.030(b) is amended to read:

(b) The department may grant [PAY] to a municipality, as funds are available, up to the lesser of 50 [25] per cent of the eligible [ESTIMATED] cost or 50 per cent of the eligible [ESTIMATED] cost not financed [BORNE] by the federal government, [IF THERE IS FEDERAL ASSISTANCE,] for [OF] public water supply, treatment and distribution systems and public sewage collection, treatment and discharge facilities for which construction has not commenced on or before the effective date of this Act [SYSTEMS, INCLUDING COLLECTION AND IMPOUNDING FACILITIES, AND OF THOSE PORTIONS OF SEWERAGE SYSTEMS NOT COVERED BY (a) OF THIS SECTION]. The eligible [ESTIMATED] cost of a project or portions of a project [ANY PART OF A SYSTEM] will be as determined by the federal agency granting [WHICH GIVES] the most monetary assistance [OR, IF NONE, BY THE DEPARTMENT]. On projects or portions of projects, for which federal participation is not available, eligible costs will be determined by the department. Projects [SYSTEMS] shall be constructed

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in accordance with [ACCORDING TO] plans and specifications approved by [THE FEDERAL AGENCY WHICH GIVES THE MOST MONETARY ASSISTANCE OR, IF NONE, BY] the department.

* Sec. 3. AS 46.03.100(a) is amended to read:

(a) A person who conducts an [A COMMERCIAL OR INDUSTRIAL] operation which results in the disposal of solid or liquid waste material or heated process or cooling water into the waters or onto the land of the state must procure a permit from the department before disposing of the waste material or water. The permit must be obtained for direct disposal and for disposal into publicly operated sewerage systems.

* Sec. 4. AS 46.03.110(a) is amended to read:

(a) An application for a permit shall be made on forms prescribed by the department or on forms prescribed by the United States Environmental Protection Agency and shall contain the name and address of the applicant, a description of his operations, the quantity and type of waste material sought to be disposed of, the proposed method of disposal, and any other information considered necessary by the department. Application for permit shall be made at least 60 days before commencement of a proposed discharge.

* Sec. 5. AS 46.03.110 is amended by adding a new subsection to read:

(e) If the department has certified a National Pollutant Discharge Elimination System permit under sec. 401 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. Sec. 1341), and the United States Environmental Protection Agency has issued that permit to a person, the department may waive the requirements of this section, and adopt the federal permit as the permit required under sec. 100 of this chapter.

* Sec. 6. AS 46.03.180 is amended to read:

Sec. 46.03.180. CONFIDENTIALITY OF RECORDS. Records and information other than emission data in the possession of the department which relate to production or sales figures or to processes or production techniques of the owner or operator of an air contaminant source are considered confidential records of the department after application by the party and certification that their public disclosure would tend to adversely affect his competitive position.

* Sec. 7. AS 46.03.720 is amended to read:

Sec. 46.03.720. CONSTRUCTION AND OPERATION OF CERTAIN FACILITIES PROHIBITED. (a) No person may construct, extend, install or operate a sewerage [SEWAGE] system or treatment works, or any part of a sewerage [SEWAGE] system or treatment works, until plans for it are submitted to the department for review[,] and the department approves them in writing and issues a written permit. [THE DEPARTMENT MAY WAIVE THE REQUIREMENT THAT PLANS BE SUBMITTED TO IT.]

(b) No person may construct, extend, install or operate a public water supply system, or any part of a public water supply system until plans for it are submitted to the department for review and the department approves them in writing.

(c) The department may waive the requirements of this section.

* Sec. 8. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.755. DISCHARGE REPORTING. (a) A person in charge of a facility, operation or vessel, as soon as he has knowledge of any discharge from the facility, operation or vessel in violation of secs. 740 or 750 of this chapter, shall immediately notify the department of the discharge.

(b) Notwithstanding (a) of this section, the department may enter into a written agreement with a person for the periodic reporting of minor discharges other than into the waters of the state.

* Sec. 9. AS 46.03.760 is repealed and re-enacted to read:

Sec. 46.03.760. CIVIL ACTION FOR POLLUTION; DAMAGES. (a) A person who violates or causes or permits to be violated a provision of this chapter or a regulation, a lawful order of the department, or a permit or term or condition of a permit issued under this chapter is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $500, nor more than $100,000 for the initial violation, nor more than $5,000 for each day thereafter on which the violation continues, and which shall reflect, where applicable:

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, which shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation; and

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged.

(b) Actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature.

(c) The court, upon motion of the department or upon its own motion, may defer assessment of all or part of that portion of the sum imposed upon a person under (a)(3) of this section conditioned upon the person complying, within the shortest feasible time, with the requirement for which a violation is shown.

(d) As used in this section, "economic savings" means that sum which a person would be required to expend for the planning, acquisi-

tion, siting, construction, installation and operation of facilities necessary to effect compliance with the standard violated.

(e) In addition to liability under (a)--(d) of this section, a person who violates or causes or permits to be violated a provision of secs. 740--750 of this chapter is liable to the state, in a civil action, brought under sec. 822 of this chapter, for the full amount of actual damages caused to the state by the violation, including direct and indirect costs associated with the abatement, containment or removal of the pollutant, restoration of the environment to its former state, and all incidental administrative costs.

* Sec. 10. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.765. INJUNCTIONS. The superior court has jurisdiction to enjoin a violation of this chapter, or of a regulation, lawful order of the department, or permit or term or condition of a permit issued under this chapter. In actions brought under this section, temporary or preliminary relief may be obtained upon a showing of an imminent threat of continued violation, and probable success on the merits, without the necessity of demonstrating physical irreparable harm. The balance of equities in actions under this section may affect the timing of compliance, but not the necessity of compliance within a reasonable period of time.

* Sec. 11. AS 46.03.790 is repealed and re-enacted to read:

Sec. 46.03.790. CRIMINAL PENALTIES. (a) A person who violates or who causes or permits a violation of a provision of this chapter, or of a regulation, lawful order of the department, or permit or term or condition of a permit issued under this chapter is guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than $25,000 and costs of prosecution.

(b) A person who wilfully violates a provision of this chapter, or

of a regulation, lawful order of the department, or permit or term or condition of a permit issued under this chapter is guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than $25,000 and costs of prosecution, or by imprisonment for not more than one year, or by both fine, costs, and imprisonment.

(c) Each day on which a violation described in (a) or (b) of this section occurs is considered a separate violation.

(d) A person who fails to provide or falsely states information required under sec. 755 of this chapter is guilty of a misdemeanor, and, upon conviction, is punishable by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both. Each unlawful act constitutes a separate offense.

* Sec. 12. AS 46.03.810(a) is amended to read:

(a) A person is guilty of creating or maintaining a nuisance if he

(1) places or deposits upon a lot, street, beach, or premises, or upon[,] or anywhere within 200 feet of a public highway, [UNLESS THE HIGHWAY ABUTS UPON TIDAL WATER,] any garbage, offal, dead animals, or any other matter or thing, which would be obnoxious or cause the spread of disease or in any way endanger the health of the community;

(2) allows to be placed or deposited upon any premises owned by him or under his control garbage, offal, dead animals, or any other matter or thing which would be obnoxious or offensive to the public or which would produce, aggravate, or cause the spread of disease or in any way endanger the health of the community.

* Sec. 13. AS 46.03.822 is amended to read:

Sec. 46.03.822. STRICT LIABILITY FOR THE DISCHARGE OF HAZARDOUS SUBSTANCES. To the extent not otherwise preempted by federal law, a

person owning or having control over a hazardous substance which enters in or upon the waters, surface or subsurface lands of the state is strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by the entry. [IF AN ACTION IS BROUGHT BY THE STATE TO RECOVER DAMAGES FOR OIL POLLUTION, LIABILITY IS LIMITED AS SPECIFIED IN SEC. 760(b) OF THIS CHAPTER.] In an action to recover damages, the person is relieved from strict liability, without regard to fault, if he can prove

(1) that the hazardous substance to which the damages relate entered in or upon the waters, surface or subsurface lands of the state solely as a result of

(A) an act of war,

(B) an intentional act or a negligent act of a third party, other than a party (or its employees) in privity of contract with, or employed by, the person,

(C) negligence on the part of the United States government or the State of Alaska, or

(D) an act of God; and

(2) in relation to (1)(B), (C) or (D) of this section, that he discovered the entry of the hazardous substance in or upon the waters, surface or subsurface lands of the state and began operations to contain and clean up the hazardous substance within a reasonable period of time.

* Sec. 14. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.850. COMPLIANCE ORDER. (a) When, in the opinion of the department, a person is violating or is about to violate a provision of this chapter or a regulation or lawful order of the department, or a permit or a term of a permit issued by the department, the department may notify the person of its determination by personal service or

certified mail. The determination and notice do not constitute an order under sec. 820 of this chapter.

(b) The recipient of the determination must file with the department, within the time period specified in the notice, a report stating what measures have been and are being taken, or are proposed to be taken, to correct or control the conditions outlined in the notice.

(c) After the report is filed under (b) of this section or the time period specified for it has elapsed, the department may issue a compliance order in conformity with the authority of the department and the public policy declared in sec. 10 of this chapter. A copy of the compliance order shall be served personally or sent by certified mail to the person affected. A compliance order is effective upon receipt.

(d) Within 30 days after receipt, the recipient may request a hearing to review the compliance order. Failure to request a hearing within 30 days after the receipt of a compliance order constitutes a waiver of the recipient's right of review.

(e) The department shall hold a hearing within 20 days after receipt of a request for one under (d) of this section. After the hearing, the department may rescind, modify or affirm the compliance order.

(f) The attorney general shall seek enforcement of a compliance order.

* Sec. 15. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.875. REMEDIES CUMULATIVE. All remedies provided by this chapter are cumulative, and the securing of relief, whether injunctive, civil or criminal, under a section of this chapter does not estop the state from obtaining relief under any other section of this chapter.

* Sec. 16. AS 46.03.900(12) is amended to read:

(12) "other wastes" means garbage, refuse, decayed wood, sawdust, shavings, bark, trimmings from logging operations, sand, lime cinders, ashes, offal, oil, tar, dyestuffs, acids, chemicals, heat from cooling or other operations, and other substances not sewage or industrial waste which may cause or tend to cause pollution of the waters of the state;

* Sec. 17. AS 46.03.900(20) is amended to read:

(20) "standard" means the measure of purity or quality for air, water, and land [WATERS] in relation to their reasonable and necessary use as established by the department;

* Sec. 18. AS 44.62.330 is amended by adding a new paragraph to read:

(43) Department of Environmental Conservation, except to the extent that secs. 360--400 of this chapter are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03.

* Sec. 19. AS 46.03.030(a), 46.03.130, 46.03.230(a), 46.03.240 and 46.03.750(d) are repealed.

* Sec. 20. This Act takes effect immediately in accordance with AS 01.10.070(c).

ballast water from a cargo tank of a tank vessel into the waters of the state. A tank vessel may not take on petroleum or a petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast from cargo tanks into the waters of the state and the master of the vessel certifies that fact on forms provided by the department.

(b) The master of a tank vessel may discharge ballast water from a cargo tank of his tank vessel if it is necessary for the safety of the tank vessel and no alternative action is feasible to assure the safety of the tank vessel. (§ 3 ch 120 SLA 1971; am § 19 ch 220 SLA 1976; am § 3 ch 266 SLA 1976; am § 3 ch 116 SLA 1980)

Cross references. — As to discharge of ballast into navigable waters, see AS 30.50.020.

Effect of amendments. — The 1980 amendment rewrote this section.

Editor's notes. — Section 11, ch. 266, SLA 1976, provides: "Severability. If any provision of this Act or the application of it to any person or circumstance is held invalid, particularly those provisions that establish incentives for carriers to use vessels with certain safety or maneuvering capability features, the remainder of this Act and the application to other persons or circumstances, including but not limited to those provisions which create a coastal protection fund, shall not be affected."

Sec. 46.03.755. Discharge reporting. (a) A person in charge of a facility, operation or vessel, as soon as he has knowledge of any discharge from the facility, operation or vessel in violation of AS 46.03.740 or 46.03.750 shall immediately notify the department of the discharge.

(b) Notwithstanding (a) of this section, the department may enter into a written agreement with a person for the periodic reporting of minor discharges other than into the waters of the state. (§ 8 ch 220 SLA 1976; am § 4 ch 266 SLA 1976; am § 4 ch 116 SLA 1980)

Effect of amendments. — The 1980 amendment deleted "or AS 30.25.020" following "46.03.750" in subsection (a).

Editor's notes. — Section 11, ch. 266, SLA 1976, provides: "Severability. If any provision of this Act or the application of it to any person or circumstance is held invalid, particularly those provisions that establish incentives for carriers to use vessels with certain safety or maneuvering capability features, the remainder of this Act and the application to other persons or circumstances, including but not limited to those provisions which create a coastal protection fund, shall not be affected."

Sec. 46.03.758. Civil penalties for discharges of oil. (a) The legislature finds that

(1) recent information discloses that the discharge of oil may cause significant short and long-term damage to the state's environment. Even minute quantities of oil released to the environment may cause high mortalities among larval and juvenile forms of important commercial species, may affect salmon migration patterns, and may otherwise degrade and diminish the renewable resources of the state;

(2) the exact nature and extent of oil pollution can be neither documented with certainty nor precisely quantified on a spill-by-spill basis; however, in light of the magnitude of harm which may be caused by oil discharges, and the vital importance of commercial, sport and subsistence fishing, tourism, and Alaska's natural abundance and beauty to the economic future of the state, and its quality of life, it is the judgment of the legislature that substantial civil penalties should be imposed for the discharge of oil, in order to provide a meaningful incentive for the safe handling of oil and to insure that the public does not bear substantial losses from oil pollution for which, because of its subtle, long-term or unquantifiable nature, compensation would not otherwise be received; and

(3) the handling of oil in large quantities is a hazardous undertaking which poses a significant threat to the economy and environment of the state, which can be substantially reduced only by the taking of rigorous safety precautions involving considerable expense; conversely, persons handling oil in smaller amounts pose a correspondingly lower risk to the economy and environment of the state, and are capable of safe oil handling practices at correspondingly lower costs; in order to provide an incentive which is effective, but not punitive, it is necessary and appropriate that the assessment of civil penalties for discharges of small quantities of oil be left for case-by-case judicial determination, while insuring, through the penalty provisions of this section, that the handling of oil in large quantities occurs in a manner which will not impair the renewable resources of the state.

(b) No later than the 10th day after the convening of the Second Session of the Tenth Alaska Legislature, the department shall submit to the legislature regulations establishing the following schedule of fixed penalties for discharges of oil:

(1) Subject to (3) of this subsection, the penalties for the following categories of receiving environments may not exceed

(A) $10 per gallon of oil which enters an anadromous stream or other freshwater environment with significant aquatic resources;

(B) $2.50 per gallon of oil which enters an estuarine, intertidal or confined saltwater environment; and

(C) $1 per gallon of oil which enters an unconfined saltwater environment, public land or freshwater environment without significant aquatic resources.

(2) For discharges of oil which are caused by the gross negligence or intentional act of the discharger, or when the court finds that the discharger did not take reasonable measures to contain and clean up the discharged oil, the penalty shall be determined by multiplying the penalty established under (1) of this subsection by a factor of five.

(c) Regulations adopted under (b) of this section shall become effective 60 days after submission to the legislature, unless disapproved by a special concurrent resolution introduced in either house, and con-

curred in by a majority of the members in joint session within 60 days of the submission of the regulations. The department may periodically revise regulations adopted under (b) of this section. Revised regulations shall be submitted to the legislature no later than 10 days after the convening of the appropriate regular session of the legislature, and are subject to disapproval as specified in this subsection.

(d) The schedule shall vary according to the toxicity, degradability and dispersal characteristics of the oil. The schedule shall also vary according to the sensitivity and productivity of the receiving environment. Variations under this subsection may be by subcategories of receiving environments, specific receiving environments, or both. The maximum penalties established in (b) of this section shall apply to discharges in the most sensitive and productive of receiving environments within each category of receiving environment, and the penalty shall decrease for less productive or sensitive receiving environments.

(e) Upon the effective date of regulations adopted under (b) of this section, if a discharge of oil in excess of 18,000 gallons not permitted under applicable state and federal law occurs within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state, the following persons, in addition to the person causing or permitting the discharge, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established in the regulations, or $100,000,000, whichever is less,

(1) if the discharge occurs from any commercial or industrial facility other than a vessel or offshore platform, the owner, lessee (or permittee), and operator of the facility;

(2) if the discharge occurs from a vessel,

(A) the owner and operator of the vessel; and

(B) the owner of the oil carried as cargo on the vessel at the time the vessel was loaded, if the loading occurred within the territorial jurisdiction of the state, or at a deepwater port or other offshore storage facility adjacent to the state; however, if the owner of the oil temporarily transfers ownership of the oil to another person, and the transfer has the purpose or effect of evading the vicarious liability imposed by this section, the transferor will be considered the owner of the oil for the purposes of this subsection; and

(3) if the discharge occurs from an offshore platform, the lessee (or permittee) of the tract or acreage upon which the platform is situated, and the operator of the platform.

(f) The court shall deduct from the penalties for which the person charged is liable under (e) of this section that amount of oil which was removed from the environment as a result of a cleanup operation undertaken in conformity with applicable state and federal law, unless the oil was removed by an agency of state, local or federal government. The dispersal of oil through the use of chemical agents or other means is not considered removal for the purposes of this subsection. The court may estimate the amount of oil removed.

(g) Except as provided in (f) and (j) of this section, the entire penalty specified in the regulations shall be imposed, except that a person who discharges oil into a receiving environment may demonstrate, by a preponderance of evidence, that mitigating circumstances relating to the effects of the discharge would make imposition of the full penalty inappropriate. In determining whether mitigating circumstances exist, the court shall recognize that scientific knowledge pertaining to oil spills is very limited and if there is insufficient knowledge either to predict a base case or to show mitigating circumstances varying from that base case, the administratively established schedule of penalties shall apply. If mitigating circumstances are proven by a preponderance of the evidence, the court may reduce or totally eliminate the penalty, in accordance with the purposes of this section.

(h) A person otherwise liable for penalties under (e) of this section is not liable if he demonstrates, by a preponderance of the evidence, that the discharge occurred solely as a result of

(1) an act of God;

(2) an act of a third person with intent to cause a discharge, unless the third person is a person with whom the person charged is made jointly and severally liable under (e)(1) — (3) of this section;

(3) a negligent or intentional act of the State of Alaska or the United States; or

(4) an act of war.

(i) Notwithstanding AS 46.03.875, a person liable under this section is not also liable for the discharge of oil under AS 46.03.760(a). A person causing or permitting a discharge of oil of 18,000 gallons or less not permitted under applicable state or federal law is liable for that discharge under the penalty provisions of AS 46.03.760(a); however, the court may impose a penalty of less than $500 for the discharge.

(j) The court may reduce the penalty imposed under this section if the person charged demonstrates, by a preponderance of the evidence, that the discharge was caused solely by a negligent act of a third person, unless the third person is a person with whom the person charged is made jointly and severally liable under (e)(1) — (3) of this section.

(k) Penalties received by the state under this section shall be deposited in the general fund and credited to a special account called the "oil spill mitigation account". The legislature may annually appropriate from the oil spill mitigation account a sum equivalent to the amount of penalties received under this section for the calendar year preceding the legislative session in which the appropriation is made, the appropriations to be made for the purpose of restoring and enhancing environments affected by oil pollution, including but not limited to the funding of aquaculture projects.

(l) As used in this section,

(1) "adjacent outer continental shelf" means that portion of the outer continental shelf which would be within the territorial jurisdiction of the state if its boundaries were extended seaward to the outer margin of the outer continental shelf;

(2) "confined saltwater environment" means a bay, sound or other partially enclosed saltwater body in which flushing through tidal or current action is significantly restricted;

(3) "discharge of oil" means the entry of oil into or upon the water or public land of the state (except oil discharges into an enclosed and impervious oil spill containment area), regardless of causation;

(4) "intertidal" means the ocean area between highest high water and lowest low water of tidal action;

(5) "offshore platform" means an offshore structure, whether floating or temporarily or permanently secured to the floor of the ocean or other water body, which is used primarily for the exploration for or production of oil or natural gas;

(6) "oil" means petroleum, crude oil, and any substance refined from petroleum or crude oil;

(7) "operator" means the person who, through contract, lease, sublease or otherwise, exerts general supervision and control of activities at the facility; the term includes, by way of example and not limitation, prime or general contractors, the master of a vessel (and his employer), or any other person who, through himself, his agents, or contractors, undertakes the general functioning of the facility;

(8) "vessel" means any form or manner of watercraft, whether or not capable of self-propulsion, except offshore platforms. (§ 1 ch 129 SLA 1977; am §§ 1-3 ch 128 SLA 1978; am § 110 ch 59 SLA 1982)

Cross references. — For provision that actions brought under this section may be brought directly against insurers or other persons providing evidence of financial responsibility, see AS 46.04.040(e).

Effect of amendments. — The 1978 amendment substituted the language beginning "and appropriate that the assessment of civil penalties" for "that the civil penalties imposed reflect a balance between the gravity of the discharge, the magnitude of risk, and the level of incentive necessary to induce safe operations" at the end of paragraph (3) of subsection (a), inserted "in excess of 18,000 gallons" near the beginning of the introductory paragraph of subsection (e), and added the second sentence of subsection (i).

The 1982 amendment, effective May 28, 1982, deleted "notwithstanding AS 30.25.20(b)" preceding "penalties" at the beginning of subsection (k).

Editor's notes. — Section 3, ch. 129, SLA 1977, provides: "If the application of AS 46.03.758 to discharges of oil solely into and upon the adjacent outer continental shelf of the state is held invalid, the application of that section to discharges of oil into and upon the water or public land within the territorial jurisdiction of the state is not affected by that holding. This severability provision is intended to clarify and not limit the severability provision of AS 01.10.030."

The schedule of civil penalties required by (b) of this section may be found at 18 AAC 510 — 18 AAC 600. The effective date (referred to in (e) of this section) of the regulation adopting the schedules is April 19, 1978.

AS 30.25.220, referred to in subsection (k), was repealed by § 11, ch. 116, SLA 1980. For provisions concerning oil pollution control, see AS 46.04.

Sec. 46.03.760. Civil action for pollution; damages. (a) A person who violates or causes or permits to be violated a provision of this chapter or AS 46.04, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter or AS 46.04 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $500 nor more than $100,000 for the initial violation, nor more than $5,000 for each day thereafter on which the violation continues, and which shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, which shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation; and

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged.

(b) Actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature.

(c) The court, upon motion of the department or upon its own motion, may defer assessment of all or part of that portion of the sum imposed upon a person under (a)(3) of this section conditioned upon the person complying, within the shortest feasible time, with the requirement for which a violation is shown.

(d) As used in this section, "economic savings" means that sum which a person would be required to expend for the planning, acquisition, siting, construction, installation and operation of facilities necessary to effect compliance with the standard violated.

(e) In addition to liability under (a) — (d) of this section, a person who violates or causes or permits to be violated a provision of AS 46.03.740 — 46.03.750 is liable to the state, in a civil action brought under AS 46.03.822, for the full amount of actual damages caused to the state by the violation, including direct and indirect costs associated with the abatement, containment or removal of the pollutant, restoration of the environment to its former state, and all incidental administrative costs. (§ 3 ch 120 SLA 1971; am § 9 ch 220 SLA 1976; am § 5 ch 266 SLA 1976; am §§ 5, 6 ch 116 SLA 1980)

Cross references. — As to oil pollution control, see AS 46.04. For provision that actions brought under subsections (a) and (e) of this section may be brought directly against insurers or other persons providing evidence of financial security, see AS 46.04.040(e).

Effect of amendments. — The 1980 amendment substituted "AS 46.04" for "AS 30.25.020" and for "AS 30.25" and substituted "approval, or acceptance" for "or certificate" in two places, all in the introductory paragraph of subsection (a), deleted "except disbursements for pollution abatement cost under AS 30.25.260(a)(2)" following "violation" in paragraph (2) of subsection (a), and deleted the former second and third sentences of subsection (e), which read, respectively: "That portion of the damages recovered by the state in a civil action brought under AS 46.03.822 attributable to costs incurred by the department in the abatement, containment or removal of the pollutant resulting from a discharge of crude oil, refined petroleum products or their by-products shall be deposited in the coastal protection fund created under AS 30.25.220" and "Except for special risk charges collected under AS 30.25.270, a person holding a risk avoidance certificate may not be held liable for costs associated with the abatement, containment or removal of the pollutant."

NOTES TO DECISIONS

This section and AS 46.03.790 held not unconstitutional. — See Stock v. State, Sup. Ct. Op. No. 1076 (File No. 2007), 526 P.2d 3 (1974), decided prior to the 1976 amendment of those sections.

Quoted in State v. Alaska Int'l Air, Inc., Sup. Ct. Op. No. 1409 (File No. 2808), 562 P.2d 1064 (1977).

Collateral references. — Injunction against pollution of stream by private persons or corporations. 46 ALR 8.

When statute of limitations commences to run as to action against municipality for damages to riparian premises by pollution of stream by discharge of sewage. 122 ALR 1509.

Tenant's remedy against stranger for wrongful pollution of waters. 12 ALR2d 1234.

Measure and elements of damages for pollution of well, cistern, or spring. 19 ALR2d 769.

Measure and elements of damages for pollution of stream. 49 ALR2d 253.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste. 39 ALR3d 910.

Maintainability in state court of class action for relief against air and water pollution. 47 ALR3d 769.

Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices. 49 ALR3d 1239.

Liability of water supplier for damages resulting from furnishing impure water. 54 ALR3d 936.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute. 81 ALR3d 1258.

Recovery in trespass for injury to land caused by airborne pollutants. 2 ALR4th 1054.

Sec. 46.03.765. Injunctions. The superior court has jurisdiction to enjoin a violation of this chapter or AS 46.04, or of a regulation, a lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter or AS 46.04. In actions brought under this section, temporary or preliminary relief may be obtained upon a showing of an imminent threat of continued violation, and probable success on the merits, without the necessity of demonstrating physical irreparable harm. The balance of equities in actions under this section may affect the timing of compliance, but not the necessity of compliance within a reasonable period of time. (§ 10 ch 220 SLA 1976; am § 6 ch 266 SLA 1976; am § 7 ch 116 SLA 1980)

missioner presents an imminent or present danger to the health or welfare of the people of the state or would result in or be likely to result in irreversible or irreparable damage to the natural resources or environment, and it appears to be prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, the department may, without prior hearing, order that person by notice to discontinue, abate or alleviate the condition or activity. The proscribed condition or activity shall be immediately discontinued, abated or alleviated.

(b) Upon receipt of an order of the department made under (a) of this section, the person affected has the right to be heard and to present proof to the department that the condition or activity does not constitute an actual or potential source of irreversible or irreparable damage to the natural resources or environment of the state, or that the order may constitute a substantial private hardship.

(c) In the commissioner's discretion or upon application made by the recipient of an order within 15 days of receipt of the order, the department shall schedule a hearing at the earliest possible time. The hearing shall be scheduled within five days of the receipt of the application. The submission of an application or the scheduling of a hearing does not stay the operation of the department's order made under (a) of this section.

(d) After a hearing the department may affirm, modify or set aside the order. An order affirmed, modified or set aside after hearing is subject to judicial review as provided in AS 44.62.560. The order is not stayed pending judicial review unless the commissioner so directs. If an order is not immediately complied with, the attorney general, upon request of the commissioner, shall seek enforcement of the order.

(e) The department may adopt additional regulations prescribing the procedure to be followed in the issuance of emergency orders. (§ 3 ch 120 SLA 1971)

Sec. 46.03.822. Strict liability for the discharge of hazardous substances. To the extent not otherwise preempted by federal law, a person owning or having control over a hazardous substance which enters in or upon the waters, surface or subsurface lands of the state is strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by the entry. In an action to recover damages, the person is relieved from strict liability, without regard to fault, if he can prove

(1) that the hazardous substance to which the damages relate entered in or upon the waters, surface or subsurface lands of the state solely as a result of

(A) an act of war,

(B) an intentional act or a negligent act of a third party, other than a party (or its employees) in privity of contract with, or employed by,

(C) negligence on the part of the United States government or the State of Alaska, or

(D) an act of God, and

(2) in relation to (1)(B), (C) or (D) of this section, that he discovered the entry of the hazardous substance in or upon the waters, surface or subsurface lands of the state and began operations to contain and clean up the hazardous substance within a reasonable period of time. (§ 1 ch 122 SLA 1972; am § 13 ch 220 SLA 1976)

Cross references. — For provision that actions brought under this section may be brought directly against insurers or other persons providing evidence of financial responsibility, see AS 46.04.040(e).

Sec. 46.03.824. Damages. Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit. (§ 1 ch 122 SLA 1972)

IDENTIFICATION

BILL NAME

BILL NUMBER: HB100

DATE INTRODUCED: 1-23-85

RELATED BILLS PENDING

SPONSOR(S): Rules Committee By Request of the Governor

REFERRALS

INITIAL RESEARCH

INITIAL SUMMARY COMPLETED

LEGAL DIVISION SUMMARY: ✓ - Doug Mertz will attend

DEPT OF LAW SUMMARY

SPONSOR CONTACTED FOR BACKUP MATERIALS: ✓

FISCAL NOTE: - 0 -

AGENCY RESPONSE: Comm. Ross will probably attend

OTHER INTERESTED LEGISLATORS NOTIFIED

BACKGROUND RESEARCH

SIMILAR BILLS INTRODUCED IN PREVIOUS LEGISLATURES: SB534

OTHER STATE OR FEDERAL PRECEDENTS, REGULATIONS, ETC

RESPONSES FROM INTERESTED PERSONS AND/OR GROUPS: Bradbury, Bliss - maritime atty's oppose

HEARING PREPARATION

CHAIRMAN BRIEFED: ✓

DATE & PLACE SET: 1-22 Butrovich

STAFF MEMO TO COMMITTEE: ✓

TELECONFERENCE

BACKGROUND MATERIAL DISTRIBUTED

PSA/PRESS RELEASE

LIST OF WITNESSES
- Doug Mertz
- Bill Ross
- Jim Ayres

SUGGESTED AMENDMENTS/CS DRAFTED